SUPREME COURT, U. S.

APR 9 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1242

HAROLD NEBENZAL,

Petitioner,

v.

EDWARD D. RE, THEODORE JAFFEE and LAVERN R. DILWEG, as the Commissioners constituting the Foreign Claims Settlement Commission of the United States, and HENRY H. FOWLER, as the Secretary of the Treasury,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HENRY J. CLAY
FRANKLIN P. GOULD
Counsel for Petitioner
1108 16th Street, N.W.
Washington, D. C. 20036

PIETER J. KOOIMAN
Of Counsel

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on December 30, 1968.

Opinions Below

The District Court for the District of Columbia delivered no opinion. The opinion of the Court of Appeals for the District of Columbia Circuit has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was made and entered on December 30, 1968. A copy thereof is appended to this petition in the Appendix, at pp. 1a-5a. Petitioner's petition for rehearing was denied, without opinion, on January 23, 1969.

The jurisdiction of this Court is invoked under 28 U.S. Code §1254(1).

Questions Presented

1. Whether Section 11 of the War Claims Act of 1948, 62 Stat. 1240 [50 U.S. Code App. §2010], which provides that the action of the Foreign Claims Settlement Commission in allowing or denying any claim under §202 of the Act [§2017a of the said Appendix] shall be final and conclusive on all questions of law and fact and not subject to review by any court by mandamus or otherwise, precludes judicial inquiry into the validity of actions of the Commission in excess of its statutory powers?

2. Whether the Foreign Claims Settlement Commisison's purported finding and conclusion (contrary to the certification by the Small Business Administration pursuant to 50 U.S.C. App. §2017-1(a)(1)) that petitioner was not entitled as a small business concern to payment of the Commission's award in full, was a nullity as in excess of its delegated powers?

Statutes Involved

The pertinent provisions of section 11 of Title I and of sections 202, 209(a) and 213(a)(1) of Title II of the War Claims Act of July 3, 1948, C. 826, 62 Stat. 1240, as amended and added Oct. 22, 1962, Pub. L. 87-846; 76 Stat. 1107, 1111, 1112; 50 U.S.C. App. §§2010, 2017a, 2017h(a), 2017-1(a)(1). Their text is set forth in the Appendix, at pp. 14a-16a.

Statement

In this action in the nature of mandamus petitioner seeks to compel the Foreign Claims Settlement Commission ("the Commission") to certify its Award to the Secretary of the Treasury without the unauthorized "finding" and "conclusion" (contrary to the certification by the Small Business Administration) that petitioner "is not entitled to priority payment as a small business concern." Petitioner in his complaint alleges (JA 22) that, "in so finding and concluding, the Commission exceeded its jurisdiction and powers under the said War Claims Act of 1948, as amended, and such finding and conclusion are null and void."

The Commission came into being on July 1, 1954 as a consequence of "Reorganization Plan 1 of 1954 Relating to the Establishment of the Foreign Claims Settlement Commission." The Plan creating the Commission provided for the abolishment of the International Claims Commission and the War Claims Commission and for the assignment of their respective remaining functions to the new and independent agency, the Foreign Claims Settlement Commission of the United States. The basic powers of the Commission stem from the International Claims Settlement Act of 1949[1] which provided that "The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise." This provision follows the pattern of like commissions in foreign countries.

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[1] 64 Stat (1950), 22 U.S.C. 3; 1621-1627 (1952).

Section 202 of Title II of the War Claims Act of 1948 (50 U.S. Code App. 2017a) directed the Commission "to receive and to determine * * * the validity and amount of claims of nationals of the United States" for, *inter alia,* loss or destruction of property located in Germany which occurred during World War II in consequence of warlike operations.

By its Final Decision (Appendix 6a-10a), the Commission concluded that "claimant is entitled to an award in the amount of $412,000 for the loss of the subject film negatives," and entered its AWARD in these terms:

> "An award is hereby made to HAROLD NEBENZAL in the amount of Four Hundred Twelve Thousand ($412,000.) Dollars."—

without in any manner qualifying these terms, or purporting to make the award conditional on the Secretary of the Treasury's abiding by what the Court of Appeals has described as an expression of "the Commission's view of the legal effect of the certification of the Small Business Administration."

Section 213(a)(1) of the War Claims Act (50 U.S. Code App. §2017-1(a)(1)), entitled "Payment of awards; priorities; limitations," provides:

> "(a) The Secretary of the Treasury shall pay out of the War Claims Fund on account of awards certified by the Commission pursuant to this title as follows and in the following order of priority:
>
> "(1) Payment in full of awards made pursuant to section 202(d) (1) and (2) [section 2017a(d) (1) and (2) of this Appendix], and thereafter of any award made pursuant to section 202(a) to any claimant certified to the Commission by the Small Business Administration as having been, on the

> date of loss, damage, or destruction, a small business concern within the meaning now set forth in the Small Business Act, as amended."

Under date of August 15, 1964, the Commission requested the Small Business Administration (S.B.A.) to "certify to the Commission whether the claimant may be considered to have been a small business concern on said date" (during World War II) "pursuant to the provisions of Section 213(a), Public Law 87-846." (JA 18-19) The S.B.A. on May 5, 1966, issued to the Commission its certification that the claimant, petitioner herein, qualified "as a small business concern pursuant to Public Law 87-846" (Appendix, 11a-13a).

In stating its "finding" and "conclusion" to the contrary (Appendix, 10a), the Commission, while implying that the S.B.A. had gone wrong, did not say that the S.B.A. had exceeded its authority under the Act, and gave no reason why the Commission thus claimed power to pass upon the claimant's qualification for payment in full. In view of the characterization of the Commission's finding and conclusion by the Court below as "a condition accompanying allowance", and an expression of "the Commission's view" (mutually exclusive conjectures), there would seem to have been no valid reason why the Treasury Department, on being applied to for payment of the Award, refused payment—on the asserted ground that the Commission "is responsible for * * * deciding how much each claimant is entitled to as the award." (JA 19).

The Commission's award having been entered on May 17, 1967, petitioner filed his complaint on August 2, 1967. On December 11, 1967, defendants filed their motion to dismiss on the ground that the Courts lack jurisdiction over the subject matter, for the reason that, by virtue of 50 U.S.C. Code App. 2010, the decision of which peti-

tioner complains is final and conclusive and not subject to judicial review. On March 11, 1968, the District Judge filed his order dismissing the action for the reason that the Court lacked jurisdiction, "in that the decision of which plaintiff complains is judicially nonreviewable" (JA 24).

On April 3, 1968, petitioner gave notice of appeal. The appeal was argued on November 26, 1968; and on December 30, 1968, the Court of Appeals affirmed on a variety of grounds, to wit: the "broad scope" to be given to the nonreviewability statute; that the Commission's action, although "having to do with the issue of priority of payment rather than the merits of the claim * * *, embodies a condition accompanying allowance"; and that "the congressional grant of final authority to the Commission", as a matter of "reasonable interpretation", included power to make its award conditional upon the withholding of priority of payment, by expressing its (adverse) "view of the legal effect of the certification of the Small Business Administration."

That the Court of Appeals did not share the Commission's (or the District Court's) adverse "view" of the Small Business Administration's certification of petitioner for payment in full, would seem to follow from the following language (Appendix, 2a):

> "The complaint alleged, and this is not in dispute, that the Small Business Administration had certified to the Commission that both the German corporation of appellant's father and appellant, at a time which coincided with the time of the loss by the German corporation, were small business concerns within the meaning of the Small Business Act."

Petitioner's petition for rehearing was denied, without opinion, on January 23, 1969.

Reasons for Granting the Writ

We submit that the lower Courts have decided the questions presented for review in a way in conflict with applicable decisions of this Court, and that these questions should be settled by this Court.

The Court of Appeals affirmed the District Court's dismissal of the action on two grounds: first, that the "broad scope" of the nonreviewability section precludes judicial review of any action by the Commission which, even though beyond its specific statutory powers, may be construed as a "condition attached to the claim as allowed" —thus permitting, or rather suggesting, a simple, if arbitrary, device for evading any question as to the validity of the Commission's action. Secondly, that the Commission's duty to certify its award to the Secretary of the Treasury for payment (pursuant to §2017h), affords an opportunity to express its "view" of the action of the S.B.A.—and any such "reasonable interpretation" should, in view of the broad scope of the nonreviewability statute, be accorded finality—even though the Commission's "interpretation" may not be the only, nor the most, "reasonable" one.

I

Although the Court of Appeals has avoided a straightforward holding that the Commission is the final judge of the limits of its delegated power, the natural effect of its decision is to obscure and erode the elemental, and, indeed, self-evident principle, applied by this Court in the analogous case of *Social Security Board* v. *Nierotko*, 327 U. S. 358, that—

> "An agency may not finally decide the limits of its statutory power. This is a judicial function." (At p. 369.)

There the Board's interpretation of the Social Security Act, which excluded "back pay" from "wages", was held (p. 370) to go "beyond the permissible limits of administrative interpretation."

The Court of Appeals further ignored petitioner's contention that the present action, in form and in substance, is not truly one to "review" the action of the Commission but one to "strike down" a purported pronouncement in excess of its delegated power—a distinction clearly pointed out in *Leedom* v. *Kyne,* 358 U.S. 184, at p. 188—where the Court held that the law affords a judicial remedy against unlawful action of the National Labor Relations Board "apart from the review provisions of the * * * Act." The present case on its face is one "in which it is charged * * * that an administrative official * * * has acted beyond the scope of his powers": *cf. Schilling* v. *Rogers,* 363 U.S. 666, at pp. 676-7. Petitioner's complaint clearly charges "more than that the administrative action was erroneous."

The Court of Appeals, ignoring petitioner's reliance on the elemental principles cited above, followed its own decisions in *First National City Bank of New York* v. *Gilliland,* 257 F. 2d 223, cert. denied, 358 U. S. 837, and *de Vegvar* v. *Gilliland,* 228 F. 2d 640, cert. denied, 350 U.S. 994—neither of which, however, involved action by the Commission beyond its statutory power. In *de Vegvar,* the Commission's action consisted in its refusal "to examine and give effect to the Yugoslav statute relating to confiscation of property," asserted to constitute failure by the Commission to exercise the jurisdiction conferred on it by the Act. The other action complained of was the Commission's refusal to receive evidence to the effect that the Yugoslav court decree purporting to confiscate the claimant's property was null and void under the laws of Yugoslavia—asserted to be "an arbitrary act in ex-

cess of the jurisdiction of the Commision." The Court of Appeals stated (at p. 642) that—

> "Errors in the result reached, or errors in the omission of evidence or in the making of a legal ruling * * * are not grounds for judicial intervention in the face of the congressional fiat that the Commission's determinations shall be free of judicial review."

In *First National City Bank of New York* v. *Gillilland*, 257 F. 2d 223, the Commission's determination that plaintiff-appellant was not the beneficial owner of the claim, was held not to be subject to judicial review under a similar preclusive statute. The claimant, therefore, overstated its case by asserting that the Commission's determination was, in effect, "a re-definition of the Commission's jurisdiction by excluding from the benefits of the statute a class of persons meant to be covered by the statute, i.e., beneficiaries of naked trusts." The Court's rejection of an argument based on the principle that "an administrative body may not determine the limits of its grant of authority," on the ground that in none of the cases cited was there an express statutory nonreviewability provision, thus was dictum only, and, at all events, cannot be considered a deliberately reasoned decision on the point here in issue.

The Court of Appeals in the present case erred in disregarding the decisions of this Court according to which (a) the present action is not one to "review", within the meaning of the preclusive statute, and (b) an agency's action in excess of its delegated authority is always reviewable.

While these principles may well be deemed self-evident, and, therefore, to have no need to be "settled" by this Court, the way in which the Court of Appeals has avoided

applying them affords a cogent reason for full clarification by this Court. The Courts do not appear to have had occasion to remove, in the present type of case, an apparent confusion between "*finally* deciding" the limits of an agency's statutory power, on the one hand, and the inevitable *preliminary* inquiry into its own jurisdiction.

However, the English Courts have recently dealt fully with a similar preclusive statute, and, incidentally, with this apparent source of confusion. In *Anisminic, Ltd.* v. *Foreign Compensation Commission,* decided by the House of Lords on December 17, 1968, and reported at (1969) 2 Weekly Law Reports 163, it was held that the statute providing that "The determination by the commission of any application made to them under this" (Foreign Compensation) "Act shall not be called in question in any court of law," "should not be construed as including everything which purported to be a determination but was not in fact a determination because the commission had misconstrued the provision of the Order in Council defining its jurisdiction. Accordingly, the court was not precluded from inquiring whether or not the order of the commission was a nullity." (Headnote, p. 164.)

Per Lord Reid, at pp. 172 F-H—173 A:

> "But if, on a true construction of the Order, a claimant who is an original owner does not have to prove anything about successors in title, then the commission made an inquiry which the Order did not empower them to make, and they based their decision on a matter which they had no right to take into account. If one uses the word 'jurisdiction', in its wider sense, they went beyond their jurisdiction in considering the matter. It was argued that the whole matter of construing the Order was something remitted to the commission for their decision. I cannot accept that argument. I find nothing in

the Order to support it. The Order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of its powers. Of course if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that—not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal."

Per Lord Wilberforce, at p. 203 E:

"In every case, whatever the character of the tribunal, however wide the range of questions remitted to it, however great the permissible margin of mistake, the essential point remains that the tribunal has a derived authority, derived, that is, from statute: at some point, and to be found from a consideration of the legislation, the field within which it operates is marked out and limited."

And at p. 205 C-E:

"These passages at least answer one of the respondents' main arguments, to some extent accepted by the members of the Court of Appeal, which is that because the commission has (admittedly) been given power, indeed required, to decide some questions of law, arising out of the construction of the relevant Order in Council, it must necessarily have power to decide those questions which relate to the

> delimitation of its powers; or conversely that if the court has power to review the latter, it must also have power to review the former. But the one does not follow from the other: there is no reason why the Order in Council should not (as a matter of construction to be decided by the court) limit the tribunal's powers and at the same time (by the same process of construction) confer upon the tribunal power, in the exercise of its permitted task, to decide other questions of law, including questions of construction of the Order."

And at p. 207 G:

> "The respondents' argument that the commission has only to make a self-styled 'determination' in order to enjoy automatic protection is thus at once seen to be unsustainable."

See further pp. 168 F-G; 203 H to 204 A; 206 C-D.

We submit that so long as the Court below could misapprehend or evade a principle declared with unanimity by this Court and the highest British Court, it seems no overstatement to say that such principle, in its true and concrete application, remains to be, and should be, settled by this Court. No principle is truly "settled" so long as it is capable of being so grossly misapplied as was done by the Court of Appeals in this case.

It is a vital aspect of the Rule of Law that the courts shall retain the power to ensure that an administrative agency keep within the four corners of whatever (limited) jurisdiction Congress has conferred upon it, and to control any tendency towards "administrative despotism" (Tocqueville).

II

The Court of Appeals was able to extract something resembling a power in the Commission to set aside the Small Business Administration's certification, not from any express language of the War Claims Act, but by implication from the *absence* of an express statutory *prohibition* against "attaching conditions to the claim as allowed," or against "accompanying" certification of its award to the Secretary of the Treasury with an expression of its "view of the legal effect of the certification of the Small Business Administration"—a somewhat euphemistic phrase to describe brushing aside or reversing the S.B.A.'s certification. As regards the Commission's apparently unlimited authority to attach conditions to any of its awards: such a convenient, if devious, expedient apparently never occurred to the Commission itself, but appears to be a voluntary contribution to its immunity from judicial review.

If we cannot point to any applicable decision of this Court with which the lower Court's decision on this point conflicts, the simple reason is that its reasoning defies classification. For, we submit, the Court of Appeals violated several of the most elemental rules of statutory construction: in failing to take notice of the specific assignment of the matter of petitioner's qualification for priority payment to the Small Business Administration; the basic difference between the Commission's task of determining "the validity and amount of claims," quasi-judicial in nature, and the matter of payment, intrinsically an executive function, in which the Act specifically addresses itself to the Secretary of the Treasury alone; in failing to show that the Commission's purported action was "a necessary incident of (its) duty" to determine "the validity and amount of claims" (cf. *Railway Clerks* v. *Non-Contract Employees,* 380 U. S. 650, 669); in failing to recognize the plainly ministerial character of the Commission's duty to

("shall") certify "each award made pursuant to §202" (§2017a of 50 U. S. Code App.), involving no discretion to "accompany" such certification with "conditions" or with its own "views" (whether binding or merely officious); and so forth.

It is respectfully submitted that the mere fact that the Court of Appeals has so flagrantly thwarted the intention of Congress calls for "settlement" by this Court of the true construction of the pertinent statutory provisions—provisions which continue to control the Commission's future activities.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HENRY J. CLAY,
FRANKLIN P. GOULD,
Counsel for Petitioner.

PIETER J. KOOIMAN,
Of Counsel.

APPENDIX

Opinion of the Court of Appeals for the District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,901

HAROLD NEBENZAL,

Appellant,

v.

EDWARD D. RE, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Decided December 30, 1968

Before FAHY, *Senior Circuit Judge,* and McGOWAN and TAMM, *Circuit Judges.*

FAHY, *Senior Circuit Judge*: Under the War Claims Settlement Act of 1948[1] the Foreign Claims Settlement

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[1] 50 U.S.C. App. § 2001, §§ 2017-2017p.

Commission—the Commission—made an award to appellant of $412,000.00. The award was based on the destruction in Germany during World War II of film negatives of a German corporation then owned solely by appellant's father, from whom the claim came to appellant as his father's sole heir.[2] In its final decision the Commission found that at the time of the loss appellant, with regard to the destroyed property, was not a small business concern and accordingly was not entitled to priority of payment. With respect to such priority the Act provides for payment in full of awards in the general category of appellant's "to any claimant certified to the Commission by the Small Business Administration as having been, on the date of loss, damage, or destruction, a small business concern within the meaning now set forth in the Small Business Act . . ." 50 U.S.C. App. § 2017*l*(a)(1). The consequence of the decision of the Commission, if upheld, is that appellant's award, instead of being paid immediately in full, is entitled to payment immediately of only $10,000.00, plus a pro rata share of the balance of the Fund available for distribution. 50 U.S.C. App. § 2017*l*(a)(2) and (3).

Appellant sued the Commission and the Secretary to compel priority of payment, that is, immediate payment in full. The complaint alleged, and this is not in dispute, that the Small Business Administration had certified to the Commission that both the German corporation of appellant's father and appellant, at a time which coincided with the time of the loss by the German corporation, were small business concerns within the meaning of the Small Business Act.

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[2] No question arises as to the required United States nationality of appellant and his father. 50 U.S.C. App. § 2017c.

On motion to dismiss filed by the Commission and the Secretary, and on motion for summary judgment filed by appellant, the court granted the former motion and denied the latter. The court relied upon the provisions of Section 2017n of the Act, incorporating by reference Section 2010. The latter reads in part:

> The action of the Commission in allowing or denying any claim under this title . . . shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, ...

50 U.S.C. App. § 2010.

We affirm.

The above provisions respecting review, considered with the legislative history of the Act which evidences Congress' intention to leave entirely to the Commission the disposition of such claims, should be given broad scope, comparable to that given like provisions of the statutes construed in the following decisions of our court: *First National City Bank of New York* v. *Gillilland*, 103 U.S.App. D.C. 219, 257 F.2d 223, *cert denied*, 358 U.S. 837, applying 22 U.S.C. § 1641m; *De Vegvar* v. *Gillilland*, 97 U.S.App. D.C. 126, 228 F.2d 640, *cert. denied*, 350 U.S. 994, applying 22 U.S.C. § 1623h. And see *American and European Agencies, Inc.* v. *Gillilland*, 101 U.S.App.D.C. 104, 247 F.2d 95, *cert. denied*, 355 U.S. 884; *Dayton* v. *Gillilland*, 100 U.S. App.D.C. 75, 242 F.2d 227, *cert. denied*, 355 U.S. 813.

Appellant, however, points to the language of Section 2017*l*(a) that,

> The Secretary of the Treasury shall pay out of the War Claims Fund on account of awards certified by the Commission . . . in the following order of priority:

then comes the language calling for payment in full to a claimant certified to the Commission as a small business concern at the time of the loss. While it is true that such a certification of appellant's status was made by the Small Business Administration, it is also true that, as the Commission decided, appellant, not having been the owner of the property at the time of the loss, was not, "with regard to this property" at that time, a small business concern.

We think this decision with its accompanying legal conclusion that appellant was not entitled to priority of payment was made by the Commission with respect to a question of law and fact "in allowing or denying" a claim, and as such is not reviewable by the courts. True, as appellant urges, the decision having to do with the issue of priority of payment rather than the merits of the claim is in one sense not "action of the Commission in allowing or denying" a claim. But in another sense it is. It is action which embodies a condition accompanying allowance. It attaches to the claim as allowed. Moreover the certification of the Small Business Administration is made to the Commission, not to the Secretary of the Treasury who makes the payments. The Commission certifies the award of the Secretary. It is this certification upon which the Secretary acts. The Act does not provide that the Commission's certification be in the exact form of that of the Small Business Administration or that it be unaccompanied by the Commission's view of the legal effect of the certification of the Small Business Administration. The Commission

decided that the award was not to a claimant who came within the class of those whose claims were to be paid in full, since appellant's character as a small business concern at the time of the loss by another did not bring appellant within the priority-of-payment provisions of the Act. It would be inconsistent with the congressional grant of final authority to the Commission for the courts to compel a result different from this reasonable interpretation of the status of appellant's claim under the Act.

Affirmed.

Final Decision of Foreign Claims Settlement Commission

Foreign Claims Settlement Commission of the
United States
Washington, D. C. 20579

Claim No. W. 4214

Decision No. W. 20098

In the Matter of the Claim of
HAROLD NEBENZAL

Under Title II of the War Claims Act of 1948,
as amended by Public Law 87-846

Counsel for claimant:

HENRY J. CLAY, Esq.

HALPIN, KEOGH, and ST. JOHN

Appeal and objections from a Proposed Decision dated January 25, 1967.

Oral hearing requested.

Oral hearing held on March 15, 1967.

FINAL DECISION

By Proposed Decision dated and issued on January 25, 1967, that portion of this claim, based upon claimant's late father's ownership of two German companies located in Berlin, Germany, was denied on the ground that claimant had failed to meet the burden of proof, in that he failed to establish any loss, damage, or destruction of identifiable

tangible personal property during the statutory period, September 1, 1939, to May 8, 1945, as a result of military operations or special measures. A further portion of this claim, based upon the asserted loss of certain furniture and objects of art situated in a warehouse in Berlin, Germany, was also denied on the ground that claimant had failed to sustain the burden of proof, in that he failed to establish any loss, damage, or destruction of the property claimed during the statutory period.

The final portion of this claim, based upon the asserted loss of a bank account, was also denied on the ground that a bank account is intangible personalty, and consequently does not constitute "property" within the purview of Section 201(d) of the Act.

Claimant, through counsel, objected to the Commission's Proposed Decision, and requested an oral hearing, at which time additional evidence and information of probative value was submitted in support of that portion of this claim based upon the loss of certain film negatives owned by Nero Film A.G.

Based upon all the evidence of record, including the testimony adduced at the oral hearing, the Commission now finds that claimant's late father, who was born in New York, New York, on July 22, 1897, was the sole owner of Nero Film A.G., a German corporation engaged in the production of motion pictures, with its place of business located at 21 Unter Den Linden, Berlin, Germany. The Commission further finds that Nero Film A.G. had in storage with Feka Film G.m.b.H., a film laboratory located at Alexandrinenstrasse 137, Berlin, Germany, the negatives of five sound pictures and four silent pictures which it had produced and that in 1942 the laboratory was de-

stroyed as a direct consequence of military operations of war.

The evidence of record further discloses, and the Commission so finds, that claimant is the sole heir of his late father, who died on September 25, 1961, in Munich, Germany; and that as the sole heir of the decedent, claimant inherited his claim for war damages.

In determining the value of the aforesaid negatives thus destroyed, the Commission has considered the statements of prominent individuals in the motion picture industry, the testimony adduced at the oral hearing, and evidence submitted by the decedent in a postwar restitution proceeding in Germany. In addition, the Commission has conducted an independent investigation into the wartime value of motion picture negatives in Germany and elsewhere in Europe. On the basis of all of the evidence of record, the Commission finds that the normal life span for films from the commencement of the period of their distribution would be approximately three years, and that at the end of such a period they would have only a residual salvage value; that the value of a given film would be the actual cost of production reduced by the length of time that any such film had been shown to the public on the basis of a three year life span; that the residual salvage value of a sound film negative would be $10,000.00, and that of a silent film negative would be $5,000.00. Applying the foregoing to the present claim, and considering the fact that, due to the sequestration of the subject negatives by the defunct Nazi Government, there was not any further distribution, the Commission finds that the various negatives had the following values at the time of loss:

Final Decision of Foreign Claims Settlement Commission

Nero Film A.G. sound film negatives:	
Kohlhiesels Toechter—released in 1930	$10,000.00
Skandal Um Eva—released in 1930	10,000.00
Westfront 1918—released in 1930	10,000.00
24 Stunden, Leben Einer Frau—released in 1931	62,500.00
Testament Des Dr. Mabuse—never released	300,000.00
TOTAL	$392,500.00
Nero Film A.G. silent film negatives:	
Witwenball—release date unknown	5,000.00
Geschlechtin Fesseln—released in 1928	5,000.00
Maedchenschicksal—released in 1928	5,000.00
Menschen Am Sonntag—released in 1929	5,000.00
TOTAL	$20,000.00

The Commission concludes that claimant is entitled to an award in the amount of $412,000.00 for the loss of the subject film negatives, pursuant to Section 202(a) of the Act.

The Commission has decided that an award under Title II of the Act shall not be increased by interest. (See the *Claim of Bruno Adamski,* Claim No. W-1184, 20 FCSC Semiann. Rep. 37 [Jan.-June 1964].) Accordingly, no interest will be allowed in this claim.

Claimant asserted, and it was so argued by counsel at the oral hearing, that he is entitled to priority payment as

a small business under Section 213(a) of the Act. The Commission finds, however, that at the time of loss, the subject property was not owned by HAROLD NEBENZAL, and that he, with regard to this property, was not a small business concern. Accordingly, the Commission concludes that claimant is not entitled to priority payment as a small business concern.

It is, therefore,

ORDERED that the following award be entered, and it is, further

ORDERED that the remainder of the Proposed Decision, as amended herein, be, and the same is affirmed as the Final Decision of the Commission in this claim.

AWARD

An award is hereby made to HAROLD NEBENZAL in the amount of Four Hundred Twelve Thousand Dollars ($412,000.00).

Dated at Washington, D. C.,
and entered as the Final
Decision of the Commission
May 17, 1967

/s/ EDWARD D. RE
Edward D. Re, Chairman

/s/ THEODORE JAFFE
Theodore Jaffe, Commissioner

/s/ LAVERN R. DILWEG
LaVern R. Dilweg, Commissioner

Certification by Small Business Administration (A)

Small Business Administration
312 Fifth Street
Los Angeles, California 90013

April 12, 1966

Foreign Claims Settlement Commission of the U.S.
Washington, D.C. 20579

Attention: Walter E. Monagan, Jr.
Attorney in Charge
General War Claims Division.

Gentlemen:

Re: HAROLD NEBENZAL
War Claim No. W-4214

Reference is made to your letter dated August 5, 1964, in which you state that the above-captioned has filed a claim with the Foreign Claims Settlement Commission under Section 202(a), Public Law 87-846, and requests that the Small Business Administration certify as to whether such claimant may be considered to have been a small business concern on the date of loss.

A review of the SBA Form 355-B, *Application for Small Business Size Determination under the War Claims Act of 1948, as Amended* (*Public Law 87-846*), which was executed by Harold Nebenzal on April 5, 1966, reflects that prior to the date on which he entered the U.S. Marine Corps (December 14, 1941), he was a small business con-

cern within the meaning set forth in the Small Business Act, as amended on October 22, 1962.

/s/ ALVIN P. MEYERS
Regional Director

Enclosure

cc: Mandel Payeff, OEA
SEA, Washington

Seen and approved, Office of Economic Analysis, SBA, Wash., D. C. 5/6/66.

Certification by Small Business Administration (B)

Small Business Administration
Washington, D.C. 20416

May 6, 1966

Mr. Henry J. Clay
Abberley, Kooiman, Amon, Marcellino & Clay
55 Liberty Street
New York, New York 10005

Dear Mr. Clay:

Reference is made to your letter of April 20, 1966, concerning the war claim of Harold Nebenzal (W-4214).

On May 5, 1966, this office issued a formal clearance of the certification of Harold Nebenzal as a small business concern pursuant to Public Law 87-846.

Our Office of Economic Analysis should be forwarding such certification to the Commission at any early date.

Sincerely yours,
/s/ William L. Pellington
Attorney-Adviser

Statutes Involved

WAR CLAIMS ACT OF 1948, C. 826, 62 STAT. 1240

(50 U.S.C. App. §§2001 et seq.)

Title 1, Section 11 (50 U.S.C. App. §2010):

"* * * The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise, * * *."

Section 202(a) [50 U.S.C. App. §2017a(a)]:

"CLAIMS AUTHORIZED

The Commission is directed to receive and to determine according to the provisions of this title the validity and amount of claims of nationals of the United States for—

(a) loss or destruction of, or physical damage to, property located in Albania, Austria, Czechoslovakia, the Free Territory of Danzig, Estonia, Germany, Greece, Latvia, Lithuania, Poland, or Yugoslavia, or in territory which was part of Hungary or Rumania on December 1, 1937, but which was not included in such countries on September 15, 1947, which loss, destruction, or physical damage occurred during the period beginning September 1, 1939, and ending May 8, 1945, or which occurred in the period beginning July 1, 1937, and ending September 2, 1945, to property in territory occupied or attacked by the Imperial Japanese military forces (including territory to

which Japan has renounced all right, title, and claim under article 2 of the Treaty of Peace Between the Allied Powers and Japan) except the island of Guam; *Provided,* That claims for loss, destruction, or damage occurring in the Commonwealth of the Philippines shall not be allowed except on behalf of nationals of the United States who have received no payment, and certify under oath or affirmation that they have received no payment, on account of the same loss, destruction, or damage under the Philippine Rehabilitation Act of 1946, whether or not claim was filed thereunder; *Provided further* That such loss, destruction, or damage must have occurred, as a direct consequence of (1) military operations of war or (2) special measures directed against property in such countries or territories during the respective periods specified, because of the enemy or alleged enemy character of the owner, which property was owned, directly or indirectly, by a national of the United States at the time of such loss, damage or destruction;"

Section 209(a) [50 U.S.C. App. §2017h(a)]:

"CERTIFICATION OF AWARDS

(a) The Commission shall certify to the Secretary of the Treasury, in terms of United States currency, for payment out of the War Claims Fund each award made pursuant to section 202."

Section 213(a)(1) [50 U.S.C. App. §2017-1(a)(1)]:

"PAYMENT OF AWARDS; PRIORITIES; LIMITATIONS

(a) The Secretary of the Treasury shall pay out of the War Claims Fund on account of awards cer-

tified by the Commission pursuant to this title as follows and in the following order of priority:

(1) Payment in full of awards made pursuant to section 202(d) (1) and (2) and thereafter of any award made pursuant to section 202(a) to any claimant certified to the Commission by the Small Business Administration as having been, on the date of loss, damage, or destruction, a small business concern within the meaning now set forth in the Small Business Act, as amended."

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1242

HAROLD NEBENZAL, PETITIONER

v.

LEONARD VONB. SUTTON,* ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court is unreported. The opinion of the court of appeals (Pet. App. 1a-5a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1968. A timely petition for rehearing was denied on January 23, 1969. The petition for a writ of certiorari was filed on April 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* Mr. Sutton is the present Chairman of the Foreign Claims Settlement Commission, and is therefore named pursuant to Rule 48(3) of the Rules of this Court.

QUESTION PRESENTED

Whether the court of appeals correctly held that the action of the Foreign Claims Settlement Commission in certifying petitioner's award to the Secretary of the Treasury for non-priority payment is not subject to judicial review.

STATUTES INVOLVED

The War Claims Act of 1948, as amended (50 U.S.C. App. 2001 *et seq.*), provides in pertinent part:

> Sec. 2010:
>
> The action of the Commission in allowing or denying any claim under this title * * * shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise * * *.
>
> Sec. 2017a. Claims authorized.
>
> The Commission is directed to receive and to determine according to the provisions of this title * * * the validity and amount of claims of nationals of the United States for—
>
> (a) loss or destruction of, or physical damage to, property located in * * * Germany, * * * which loss, destruction, or physical damage occurred during the period beginning September 1, 1939, and ending May 8, 1945 * * *.
>
> Sec 2017h(a):
>
> (a) The Commission shall certify to the Secretary of the Treasury, in terms of United States currency, for payment out of the War Claims

Fund each award made pursuant to section 202 [section 2017a of this Appendix].

Sec. 2017*l*:

(a) The Secretary of the Treasury shall pay out of the War Claims Fund on account of awards certified by the Commission pursuant to this title [sections 2017-2017p of this Appendix] as follows and in the following order of priority:

(1) Payment in full of awards made pursuant to section 202(d)(1) and (2) [sections 2017a(d)(1) and (2) of this Appendix], and thereafter of any award made pursuant to section 202a [section 2017a(a) of this Appendix] to any claimant certified to the Commission by the Small Business Administration as having been, on the date of loss, damage, or destruction, a small business concern within the meaning now set forth in the Small Business Act, as amended [sections 631-647 of Title 15].

(2) Thereafter, payments from time to time on account of the other awards made pursuant to section 202 [section 2017a of this Appendix] in an amount which shall be the same for each award or in the amount of the award, whichever is less. The total payment made pursuant to this paragraph on account of any award shall not exceed $10,000.

(3) Thereafter, payments from time to time on account of the unpaid balance of each remaining award * * * which shall bear to such unpaid balance the same proportion as the total amount in the War Claims Fund and available for distribution at the time such payments are made bears to the aggregate unpaid balances of all such awards. * * *

Sec. 2017n:

> To the extent they are not inconsistent with the provisions of this title * * * the following provisions of title I of this Act * * * shall apply to this title [sections 2017-2017p of this Appendix]: * * * section 11 [section 2010 of this Appendix] of title I of this Act * * *.

STATEMENT

Petitioner filed a claim with the Foreign Claims Settlement Commission for compensation for property of his father's wholly-owned German corporation, which property was destroyed during World War II. His father had died in 1961, leaving petitioner as his sole heir. The Commission awarded petitioner $412,000.

Under Section 213(a) of the War Claims Act, 50 U.S.C. App. 2017*l*(a)(1), the Secretary of the Treasury is to pay in full, on a priority basis, awards certified by the Foreign Claims Settlement Commission to claimants who qualified as small business concerns on the date of loss. In determining whether a claimant is entitled to such priority payment, the Commission initially requests the Small Business Administration to determine whether the claimant qualified as a small business concern at the time of loss. It does not, however, act mechanically upon receipt of the Administration's reply. The Commission has consistently construed its statutory authority as entitling it to make the ultimate determination regarding entitlement to priority payment. Specifically, before certifying an award to the Secretary of the Treasury for payment

on a priority basis, the Commission requires that the small business status of a claimant must have existed with regard to the very property for which compensation is sought.[1]

Accordingly, the Commission requested and received from the Small Business Administration a certification that the corporation owned by Nebenzal's father qualified as a small business concern at the time of the property loss (J.A. 3-5), and that Nebenzal himself qualified as a small business concern prior to the time he entered military service in 1941 (J.A. 7-8). The Commission made the further finding, however, that Nebenzal's small business status could not have related to the property for which he sought compensation, since his father owned the property at its destruction. Nebenzal merely inherited a claim for compensation for the loss from his father. Since Nebenzal was not a small business concern with regard to the property for which compensation was claimed, the Commission concluded that he was not entitled to priority payment under 50 U.S.C. App. 2017*l*(a)(1), and certified his award for payment on a non-priority basis.

The effect of this determination is to prevent payment in full of the award. As with all non-priority awards, Nebenzal is entitled to immedi-

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[1] This construction has been followed consistently by the Commission. See *In the Matter of the Claim of Herman Weber*, Decision No. W-16547, decided October 10, 1966 (Government Exhibit No. 5); *In the Matter of the Claim of Helen Erdos and George Wiss*, Decision No. W-17281, decided January 11, 1967 (Government Exhibit No. 6).

ate payment of $10,000 and an eventual *pro rata* share of the balance of the War Claims Fund (50 U.S.C. App. 2017*l*(a)(2)-(3)).

Despite the Commission's specific finding that he was not entitled to priority payment, Nebenzal asked the Treasury Department to pay him on a priority basis. The Treasury Department refused, since the Foreign Claims Settlement Commission had certified the award for non-priority payment (J.A. 19-20). Nebenzal then filed this suit for an order in the nature of mandamus directing the Commission to certify his award for priority payment, and directing the Secretary of the Treasury to pay the award in full. Nebenzal's theory was that, once the Small Business Administration had certified to the Foreign Claims Settlement Commission that he was a small business concern on the date of property loss, the Commission was required automatically to certify his award to the Treasury Department for priority payment. By itself determining the small business question, Nebenzal asserted, the Commission had acted outside the scope of its jurisdiction.

The district court granted the Government's motion to dismiss, holding that the decision of the Foreign Claims Settlement Commission was judicially non-reviewable and that the Court therefore lacked jurisdiction over the subject matter of the action (J.A. 24). The court of appeals affirmed. It held that the Commission's action was with respect to a question of law and fact in allowing or denying a claim, thus falling within the express language of the non-reviewability provision. 50 U.S.C. App. 2010, 2017n. The court

stated: "It would be inconsistent with the congressional grant of final authority to the Commission for the courts to compel a result different from [the Commission's] reasonable interpretation of the status of appellant's claim under the Act" (App. 5a).

ARGUMENT

Congress provided in establishing the Foreign Claims Settlement Commission that "The action of the Commission in allowing or denying any claim under this title * * * shall be final and conclusive on all questions of law and fact and not subject to review by * * * any court by mandamus or otherwise * * *."[2] This petition represents the latest in a long series of attempts

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[2] 50 U.S.C. App. 2017n. That section is part of the 1962 amendments to the War Claims Act of 1948, 50 U.S.C. App. 2001, *et seq.*, and specifically incorporated into the 1962 amendments the finality provisions contained in 50 U.S.C. App. 2010. The House Committee Report explaining this finality unequivocally confirms congressional intent to bar judicial review of the Commission's actions. H. Rep. 2035, U.S. Code Congressional and Administrative News, 87th Cong., 2d Sess., pp. 3834-3835. A similar provision is contained in the International Claims Settlement Act of 1949, which the Foreign Claims Settlement Commission administers. 22 U.S.C. 1641(m). The legislative history of that section also reflects the clear Congressional purpose to accord unqualified finality to the decisions of the Commission. The committee reports in both Houses specifically noted the finality provisions (S. Rep. 800, 81st Cong., 1st Sess., pp. 5-6; H. Rep. 770, 81st Cong., 1st Sess., pp. 6-8); the minority report in the House took specific exception to those provisions (H. Rep. 770, Part 2, 81st Cong., 1st Sess., p. 2); a major heading in the presentation of the legislation by its sponsors on the floor of the House was called "Finality of Awards" (95 Cong. Rec. 8840); and the House, after considerable debate, rejected

to have this Court review decisions of the courts of appeals and the Court of Claims applying that provision. *Tillman* v. *United States*, 320 F. 2d 396 (Ct. Cl.), certiorari denied, 377 U.S. 904; *Tillman* v. *Anderson*, No. 15,254, decided Oct. 30, 1959 (C.A.D.C.), certiorari denied, 362 U.S. 903; *First National City Bank of New York* v. *Gillilland*, 257 F. 2d 223 (C.A. D.C.), certiorari denied, 358 U.S. 837; *American and European Agencies* v. *Gillilland*, 247 F. 2d 95 (C.A. D.C.), certiorari denied, 355 U.S. 884; *Haas* v. *Humphry*, 246 F. 2d 682 (C.A.D.C.), certiorari denied, *sub nom Haas* v. *Anderson*, 355 U.S. 854; *Dayton* v. *Gillilland*, 242 F. 2d 227 (C.A.D.C.), certiorari denied, 355 U.S. 813; *De Vegvar* v. *Gillilland*, 228 F. 2d 640 (C.A.D.C.), certiorari denied, 350 U.S. 994. In at least three of those cases, the claimant attempted to avoid the effect of the finality provision by characterizing the Commission's action as having been in excess of its authority or without its proper jurisdiction—just as petitioner does here. In each instance the attempt proved unsuccessful. *First National City Bank of New York* v. *Gillilland, supra; De Vigvar* v.

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an amendment by Congressman Keating, which would have provided judicial review (95 Cong. Rec. 8853-8855). See also 95 Cong. Rec. 8845, 8847.

Certainly in the absence of any claim of denial of a constitutional right thereby, the constitutional power of Congress to deny judicial review of the Commission's action cannot be questioned. Compare *Ludecke* v. *Watkins*, 335 U.S. 160; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *Z. and F. Assets Corp.* v. *Hull*, 311 U.S. 470; *United States* v. *Babcock*, 250 U.S. 328.

Gillilland, supra; American and European Agencies v. *Gillilland, supra.*

Petitioner's argument based on this Court's decision in *Social Security Board* v. *Nierotko*, 327 U.S. 358, was considered and rejected in *First National City Bank of New York* v. *Gillilland, supra.* There, the court noted that *Social Security Board* v. *Nierotko, supra,* did not involve a specific non-reviewability provision.[3] Moreover, the court noted that the allegedly unauthorized action of the Commission in denying an award to the claimant could have been expressly authorized by Congress; therefore, the fact that "its delegate with unreviewable power denies those benefits to such persons" does not state a ground for judicial review. 257 F. 2d at 226. As this Court stated in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 301, "All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced." Since in practical effect it determined the ultimate size of the award, as the court of appeals held (Pet. App. 5a), the Commission's "reasonable" decision of the priority question was plainly within the ambit of its responsibility to allow or deny claims.

In short, petitioner has not pointed, as indeed he cannot, to any valid reason for ignoring the express legislative objective of attaching finality to all actions the Commission takes in connection with the allowance or disallowance of claims filed with it, in order to

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[3] *Leedom* v. *Kyne,* 358 U.S. 184, relied upon by the petitioner, likewise did not involve a specific statutory bar to judicial review.

assure that distribution of the available funds be promptly made.[4]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ALAN S. ROSENTHAL,
PATRICIA S. BAPTISTE,
Attorneys.

MAY 1969

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[4] H. Rep. 2035, U.S. Code Cong. & Admin. News, 87th Cong., 2d Sess., pp. 3834-3835. Petitioner's reliance upon the decision of the House of Lords in *Anisminic Ltd.* v. *Foreign Compensation Commission*, 2 Weekly Law Reports 163 (1969, Part 5), is misplaced. The duties of the British Foreign Compensation Commission are not as broad as those of the Foreign Claims Settlement Commission, and the non-reviewability provision discussed in that case was wholly dissimilar from the one involved here. Indeed, in that case Lord Wiberforce noted (*id.* at 207H-208A):

> Of course, it would have been open to Parliament, or the executive, to provide that the distribution of this fund should be carried out entirely according to the unreviewable discretion of the commission or any other person, and if they had done so it would have been futile for any claimant to try to bring the court into the matter.

That, of course, is exactly what Congress has done in enacting 50 U.S.C. App. 2017n.

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